

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

OFFICE OF THE ADMINISTRATOR

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| IN THE MATTER OF |) | |
| |) | |
| General Motors Automotive – |) | DOCKET NO. RCRA-05-2004-0001 |
| North America |) | |
| |) | |
| RESPONDENT |) | |

INITIAL DECISION

Issued: March 30, 2006

Before: Barbara A. Gunning
Administrative Law Judge

Appearances:

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I. BACKGROUND

Procedural Background

This civil administrative penalty proceeding arises under the authority of Section 3008(a) of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6928(a). On October 17, 2003, the United States Environmental Protection Agency (“the EPA”), Region 5 (“Complainant” or “the Region”), filed a Complaint and proposed Compliance Order against General Motors Corporation (“GM” or “Respondent”).¹ Complainant charges GM with violating Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), as well as federal and state hazardous waste regulations promulgated pursuant to RCRA, at three of its facilities located in: Pontiac, Michigan; Lake Orion, Michigan, and; Moraine, Ohio.² Respondent filed its Answer and Request for Hearing on November 21, 2003.

GM opposes Complainant’s application of RCRA hazardous waste regulations upon painting operations at the three facilities, contending *inter alia*, that certain materials at the facilities are not “solid wastes” under RCRA.

On November 26, 2003, GM filed a motion to stay the proceedings before me until the United States Court of Appeals for the District of Columbia (“D.C. Circuit”) entered its final decision in a case between the EPA and General Motors. In the case before the D.C. Circuit, GM “petition[ed] for review of May 7, 2002 letters from an enforcement official at [the EPA] regarding nascent enforcement actions based on a regulatory interpretation that automobile manufacturing paint purge solvents are ‘solid waste’ under [RCRA] upon exiting the spray painting unit.” *General Motors Corp. v. EPA*, 363 F.3d 442, 444 (D.C. Cir. 2004). The D.C. Circuit refers to these letters as the “Shimberg Letters,” as they were written by Steven Shimberg, who was then Associate Assistant Administrator of EPA’s Office of Enforcement and Compliance at EPA Headquarters. *Id.* at 446-47. The Shimberg Letters were written to the Alliance of Automobile Manufacturers and several of its members, including GM. *Id.* at 447. The Shimberg Letters state, *inter alia*:

The EPA continues to stand by its’ 1997 determination on the point of generation for hazardous waste at spray paint operations and, as such, ancillary equipment transporting

¹ Throughout this decision I refer collectively to Complainant and GM as “the parties.”

² The GM facilities at issue in this matter are located as follows: (1) Pontiac East Assembly Plant, 2100 South Opdyke Road, Pontiac, Michigan 48341-3155; Orion Assembly Plant, 4555 Giddings Road, Lake Orion, Michigan 48359, and; Moraine Assembly Plant, 2601 West Stroop Road, Moraine, Ohio 45439.

the hazardous waste purge solvent from the painting operations and the storage tanks to which the mixture is conveyed are subject to RCRA.

Id. Pursuant to Section 7006(a)(1) of RCRA, 42 U.S.C. § 6976(a)(1), GM petitioned for review of the Shimberg Letters on the ground that they constituted “final agency action ... regarding the RCRA classification of purge solvents in the automobile manufacturing industry.” *Id.* at 447. The D.C. Circuit observed that its jurisdiction under Section 7006(a)(1) of RCRA was limited to review of an action of the EPA Administrator in promulgating any regulation or requirement, or denying any petition for the promulgation, amendment, or repeal of any regulation.” *Id.* at 448.

The D.C. Circuit dismissed the petition for review on the ground that it lacked jurisdiction and did not reach the merits of GM’s challenge to EPA’s regulatory interpretation. *Id.* at 453. The D.C. Circuit observed that GM seized on the Shimberg Letters to overcome the jurisdictional hurdles to petition for review, because GM was too late to challenge EPA’s regulatory interpretation on point of generation for hazardous waste at spray paint operations, which was expressed several years before the Shimberg Letters, and GM was too early to challenge the interpretation through final EPA adjudicatory action of RCRA violations at specific plants. *Id.* In this regard, the D.C. Circuit noted, “But the Shimberg letters were merely preliminary enforcement statements made as part of an informal agency-industry dialogue and, of themselves, finally determine no rights or obligations of involved parties.” *Id.* Accordingly, on April 2, 2004, the D.C. Circuit dismissed the petition for review for petition for lack of jurisdiction and did not reach the merits of GM’s challenge to EPA’s regulatory interpretation. *Id.*

Nevertheless, the D.C. Circuit’s decision in *GM* does not preclude Respondent from arguing that its paint purge solvent piping systems are not subject to RCRA. Indeed, in *GM* the D.C. Circuit stated that EPA’s regulatory interpretation that paint purge solvent piping systems can be subject to RCRA is “[p]artly a factual question” appropriately addressed in an administrative agency hearing. *Id.* at 452.

In light of the D.C. Circuit’s dismissal of GM’s petition for review, I determined that GM’s motion to stay the proceeding before me was moot and therefore issued an order on April 14, 2004, denying the motion to stay. After filing Joint Stipulations of the Parties (July 22, 2004), the Complainant and GM filed motions for accelerated decision and responses thereto on August 23, 2004 and September 23, 2004.³ I held a telephonic

³ The parties’ motions for accelerated decision and responses thereto are as follows: General Motors Corporation’s Motion for Accelerated Decision (Aug. 23, 2004) (“GM’s Motion for Acc. Dec.”); Complainant’s Motion for Partial Accelerated Decision and
(continued...)

conference with the parties on October 14, 2004, to advise the parties that I had found that genuine issues of material fact exist and that an evidentiary hearing would be necessary. Shortly thereafter I issued the written order (October 27, 2004) memorializing my denial of the parties' motions for accelerated decision.

The evidentiary hearing was held in Detroit, Michigan from June 20, 2005, through June 30, 2005. The parties submitted lengthy post-hearing briefs on September 29, 2005, and submitted their post-hearing reply briefs on October 17, 2005.

RCRA's Definition of "Solid Waste"

"RCRA is a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 U.S.C. §§ 6921-6934." *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 331 (1994). The objective of RCRA is "to promote the protection of health and the environment and to conserve valuable material and energy resources" RCRA § 1003(a), 42 U.S.C. § 6902(a). In passing RCRA, Congress expressed concern over the "rising tide of scrap, discarded, and waste materials." RCRA § 1002(a)(2), 42 U.S.C. § 6901(a)(2) (cited in *American Mining Congress v. EPA.*, 824 F.2d 1177, 1179, 1185 (D.C. Cir. 1987) ("AMC I")).

"RCRA includes two major parts: one deals with non-hazardous solid waste management and the other with hazardous waste management." *AMC I*, 824 F.2d at 1179. "Under the latter, EPA is directed to promulgate regulations establishing a comprehensive management system." *Id.* "EPA's authority, however, extends only to the regulation of 'hazardous waste.'" *Id.* "Because 'hazardous waste' is defined as a subset of 'solid waste,' [42 U.S.C.] § 6903(5), the scope of EPA's jurisdiction is limited to those materials that constitute 'solid waste.'" *Id.*

"The term 'hazardous waste' means a *solid waste, or combination of solid wastes*, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may – (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when

³(...continued)

Supporting Brief on Threshold Legal Issue (Aug. 23, 2004) ("Complainant's Motion for Acc. Dec."); General Motors Corporation's Response to Complainant's Motion for Partial Accelerated Decision and Supporting Brief on Threshold Legal Issue (Sep. 23, 2004) ("GM's Response to EPA's Motion for Acc. Dec."), and; Complainant's Brief in Response to General Motors' Motion for Accelerated Decision (Sep. 23, 2004) ("Complainant's Response to GM's Motion for Acc. Dec.").

improperly treated, stored, transported, or disposed of, or otherwise managed.” RCRA § 1004(5), 42 U.S.C.A. § 6903(5) (emphasis added).

In RCRA Congress defines “solid waste” as “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility *and other discarded material*, including solid, liquid, semisolid, or contained gaseous material”⁴ RCRA § 1003(27), 42 U.S.C. § 6903(27) (emphasis added). Pursuant to the applicable regulations, “solid waste” (which is referred to as “waste” in the Michigan and Ohio regulations) is “any discarded material that is not excluded by § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.” 40 C.F.R. § 261.2(a)(1); *accord* Mich. Admin. Code R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D). “Discarded material” is defined in the regulations as including materials that are “Abandoned” or “Recycled,” as further explained in the regulations.⁵ 40 C.F.R. § 261.2(a)(2); *accord* Mich. Admin. Code R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D).

The regulatory definition of “Abandoned” is as follows: “Materials are solid waste if they are *abandoned* by being: (1) Disposed of; or (2) Burned or incinerated; or (3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.” 40 C.F.R. § 261.2(b); *accord* Mich. Admin. Code R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D). As discussed further herein, I conclude that the materials at issue in this case are “solid wastes” on the basis of being “recycled,” as defined in the regulations.

Under the regulatory definition of “discarded,” the subcategory of “Recycled” refers to the following: “Materials are solid wastes if they are recycled – or accumulated,

⁴ The full statutory definition of “solid waste” is “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33 [Clean Water Act], or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. § 2011 et seq.].” RCRA § 1003(27), 42 U.S.C. § 6903(27).

⁵ The other two categories of “discarded material” are “inherently-wastelike” and “military munitions.” 40 C.F.R. § 261.2(a)(2); *accord* Mich. Admin. R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D).

stored, or treated before recycling . . .” as further specified in four categories: (1) “Used in a manner constituting disposal,” (2) “Burning for energy recovery,” (3) “Reclaimed,” or (4) “Accumulated speculatively.” Materials are “solid wastes” if they are both in one or more of the latter four categories and dependent on other requirements being met, such as whether the materials are “spent materials,” or alternatively, whether they are listed sludges, characteristic sludges, listed by-products, characteristic by-products, listed commercial chemical products, or scrap metal other than excluded. 40 C.F.R. § 261.2 – Table 1; *accord* Mich. Admin. R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D).

The regulatory history often uses the term “Secondary Materials,” which appears to simply be a substitute for referring to the aforementioned regulatory definition of “recycled.” For instance, under the preamble to the final definition of “solid waste,” the term “secondary materials” is defined as “a material that potentially can be a solid and hazardous waste when recycled.” *Hazardous Waste Management System; Definition of “Solid Waste,”* 50 Fed. Reg. 614, 616 n.4 (Jan. 4, 1985). Moreover, the preamble references the following types of secondary materials: spent materials, sludges, by-products, scrap metal, and commercial chemical products recycled in ways that differ from their normal use. *Id.*

The instant decision focuses on, and much of the parties’ debate concerns, the category of “spent materials.” The regulations define “spent materials” as “any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.” 40 C.F.R. § 261.1(c)(1); *accord* Mich. Admin. R. 299.9107; Ohio Admin. Code § 3745-51-01(c)(1). The parties’ debate further centers on whether GM’s used solvents are “spent” upon applying EPA’s continued use doctrine for solvents, and concerns the point of generation at which such solvents become wastes (if ever). Furthermore, GM argues that its used solvents were not “wastes” because they were not “discarded” within the statutory meaning of the term “solid waste,” as interpreted by the D.C. Circuit.

II. FACTUAL FINDINGS

EPA’s representatives conducted inspections of GM’s vehicle assembly facilities in Pontiac, Michigan; Lake Orion, Michigan, and; Moraine, Ohio in March 2001, January 2003, and April 2001, respectively. Joint Stipulations of the Parties (July 22, 2004) (“Joint Stipulations”) ¶ 1.⁶ Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, a State may be authorized to operate that State’s hazardous waste program, or a portion thereof,

⁶ The parties stipulated to facts concerning the generalized operations, including painting, at the Pontiac, Orion, and Moraine facilities. During the course of the hearing, GM presented testimony and exhibits concerning operations at the three facilities, but primarily focused on the Orion facility.

in lieu of the Federal program. The EPA authorized the State of Michigan (“Michigan”) to administer portions of the hazardous waste program in lieu of the federal program. *Id.* ¶ 7. Specifically, the EPA has authorized Michigan to administer the base hazardous waste program (which includes subpart J), as well as the subpart BB and CC regulations. *Id.* However, the EPA did not authorize Michigan to administer subparts BB and CC until July 31, 2002. 67 Fed. Reg. 49,617. The EPA has authorized the State of Ohio (“Ohio”) to administer the base hazardous waste program, which includes the Subpart J regulations. Joint Stipulations ¶ 8. The EPA administers the subpart BB and CC rules in the State of Ohio. *Id.* ¶ 9.

Various car and truck parts, including bodies, panels, axles, and engines, are sent to each of GM’s three assembly facilities subject to this action where they are assembled into finished vehicles. *Id.* ¶ 10. The assembly process at each of the three GM facilities consists of three major operations that occur in sequence – body assembly, painting, and general/final assembly. *Id.* ¶ 12.

After vehicle bodies are assembled, the vehicles are prepared for painting. *Id.* ¶ 13. GM paints the vehicles in paint booths at each of GM’s facilities. *Id.* GM uses various kinds of “solvent-based” paint to paint vehicles at each of its facilities. *Id.* ¶ 14. These paints are called “solvent-based” paints because the paint formulations contains organic solvent. *Id.* Solvent-based paint consists of (a) solids/pigments or resins, and (b) paint solvent. *Id.* ¶ 15. The solids/pigments (referred to herein as “paint solids”) are what give paint its color. *Id.* The solvent in the paint helps perform the following functions: solubilize some of the paint solids into solution; mobilize some of the paint solids in suspension; maintain the viscosity of the paint by serving as a diluent; minimize clogging of the paint equipment and associated lines; and allow the paint solids to flow and to be evenly and smoothly applied to the vehicle. *Id.* The portion of the paint that actually remains on the vehicle after painting and curing is the solids, not the paint solvent. *Id.*

GM’s painting operation at each facility involves the sequential application of three kinds of solvent-based paint – primer coat, basecoat, and clear coat. *Id.* ¶ 16. At Orion, GM uses water-borne basecoat, and at Moraine GM uses powder-coat primer and water-borne basecoat.⁷ Tr. (June 23) at 91-94. GM uses solvent-based primer, basecoat, and clear coat at Pontiac and solvent-based primer and clear coat at Orion, and solvent-based clear coat at Moraine. *Id.* The non-solvent based paints are not purged into the system at issue here. At issue in this case is only the purged solvent-based paint/resin.

⁷ Although the parties stipulated that “GM’s painting operation at each facility involves the sequential application of three kinds of solvent-based paint – primer coat, basecoat, and clear coat,” the record reflects that the basecoat at Orion and the primer and basecoat at Moraine are not solvent-based. Tr. (June 23) at 91-94.

The paints are applied to vehicles via paint applicators in paint booths. Joint Stipulations ¶ 16. The painting process in the paint booths at each facility uses robotic spray guns and electrostatic bells – collectively referred to herein as “paint applicators” – to paint the vehicles. *Id.* ¶ 17. As a vehicle reaches the paint applicators, the applicators are automatically triggered to begin painting their specific portions of the vehicle, then automatically turn off, and the robotic applicators then return to their ready positions. *Id.* The vehicle then continues traveling down the paint line until painting is complete. *Id.* Once a vehicle is fully painted, it exits the paint operations and travels to the general/final assembly area. *Id.* ¶ 18. GM does not paint vehicles downstream of the paint booths. Tr. (June 21) at 125.

All the different types of paints used at each of these facilities (*i.e.*, primers, different colored basecoats, and clear coats) are stored in various storage tanks or totes called “mix tanks” which are located in a portion of each facility called the “Paint Mix Room.” Joint Stipulations ¶ 19. These mix tanks are equipped with agitators or mixers that help keep paint solids in suspension and prevent the paint solids and paint solvent from separating, and that minimize clogging of paint equipment and associated lines. *Id.* The Paint Mix Room is located “upstream” of the paint booths. *Id.* Paint is pumped through a system of paint delivery pipes or lines from the mix tanks to the paint booths. *Id.*

The paint applicators are located inside the paint booths. *Id.* ¶ 20. These paint applicators are equipped with a manifold system immediately prior to or “upstream” of the applicators. *Id.* The manifold system, which is generally depicted in Figure 2 attached hereto, consists of a system of valves, electronics, a manifold that keeps different color paints separated, and a flow meter. *Id.* The manifold system regulates the flow of paint, purge solvent (described below) and air to the paint applicators. *Id.* Prior to the time paint enters the manifolds at each facility, the paint is continuously circulated through the mix tanks and associated paint delivery lines upstream of the manifolds to prevent the paint solids and paint solvent from separating or clogging the paint delivery system. *Id.* ¶ 21. When it is time for a particular paint to be delivered to the paint applicators, the appropriate valve in the manifold opens.⁸ *Id.* ¶ 22. That paint then flows through the manifold, the line between the manifold and the paint applicator, the flow meter, and the applicator itself (“the manifold and associated applicator”), and then out onto the vehicle. *Id.*

⁸ GM also periodically uses purge solvent to clean the manifolds and associated applicators, even if there is no color change, to prevent solids from gumming up the equipment and to allow the continued free flow of paint. Joint Stipulations ¶ 36. These purge operations are functionally the same as the color change purge process described above, and the resulting purge mixture is managed just like the purge mixture generated from a color change. *Id.*

purge solvent, thus forming the purge mixture.¹² The evidence is not overwhelming in Complainant's favor, but the standard of proof is a preponderance of the evidence. *See* 40 C.F.R. § 22.24(b).

I recognize that the focus of GM's argument is on the purge mixture when it is in the pipes downstream of the manifold and associated applicators. GM primarily contends that the purge mixture is not a waste because, through "continued use," its solvents clean and thereby reduce clogging of the pipes. Moreover, GM argues that the transfer of the purge mixture through the pipes to the purge mixture storage tanks is part of the same manufacturing process.

As jurisdiction is at stake, however, consideration must be given to the next logical extension of GM's theory. If the purge mixture is not a waste in the pipes and the storage tank, then when under GM's theory does the purge mixture become a waste? From the purge mixture storage tank, the purge mixture is put into tanker trucks that are driven to TSD facilities, where they are recycled, in that much of the solvent in the purge mixture is reclaimed while some of the material was burned or incinerated. However, GM does not concede that the purge mixture *ever* becomes a waste at *any* stage in this process. Instead, GM stresses that its intent is that one-hundred percent of the solvent should be reclaimed. Moreover, GM suggests that the purge mixture is a non-waste in the tanker trucks, while they are on the highway, as purge mixture retains the ability to suspend the paint solids and reduce their ability to stick to the walls of the tanker truck.

The crux of this matter concerns the point of generation when solvents used at the GM facilities become "solid wastes" and thereby are subject to regulation under RCRA. The alleged violations pertain to GM's failure to comply with RCRA regulations at its facilities. Accordingly, if the solvents were not "solid wastes" while they were at the facilities, this case should be dismissed. For the reasons stated herein, I conclude that solvents became "solid wastes" while at GM's facilities, and that the point of generation was immediately after the solvents left the manifolds and associated applicators, when the paint solids mixed with the solvents, thereby contaminating the solvents and rendering them "spent."¹³

As discussed *supra*, in RCRA Congress defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or

¹² However, as discussed in further detail, [REDACTED]

¹³ As noted, however, at Orion the point of generation begins after the purge mixture exits the mini purge pots.

[REDACTED] formulation to prevent clogging is credible. If [REDACTED] were not essentially complete at the mini purge pot juncture, the mini purge pots and/or purge pot equipment could not perform effectively.

iv. GM's Solvent in the Purge Mixture Does Not Qualify As a Non-Waste Under EPA's Continued Use Doctrine

With regards to continued use of solvents, GM places a great deal of reliance on the 1998 Safety-Kleen determination and the preamble. Far more on point are determinations such as those in the Sasserville Letter, that directly addressed used solvents at automobile painting facilities, rather than solvents that are further used to clean drums. Under the Sasserville Letter (written in June 2000) and its progeny, used solvents at automobile painting facilities were considered “wastes” even though they kept contaminants in suspension on the way to the purge mixture storage tanks.²⁹

Nevertheless, with regards to the preamble to the definition of “spent materials,” I find that EPA’s policy requiring that used solvents pick up additional contaminants is not in conflict. *See* 50 Fed. Reg. at 624. In fact, the solvents described in the preamble as being in continued use appear to pick up additional contaminants. Notably, the solvents described in the preamble were first used to clean circuit boards and then, not being pure enough to clean circuit boards, were later used to as metal degreasers, 50 Fed. Reg. at 624 (emphasis added):

The Agency's reference to original purpose was ambiguous when applied to situations where a material can be used further without being reclaimed, but the further use is not identical to the initial use. *An example of this is where solvents used to clean circuit boards are not [sic] longer pure enough for that continued use, but are still pure enough for use as metal degreasers. These solvents are not spent materials when used for metal degreasing. The practice is simply continued use of a solvent.* (This is analogous to using/reusing a secondary material as an effective substitute for commercial products.) The reworded regulation clarifies this by stating that spent materials are those that have been used, and as a result of that use become contaminated by physical or chemical impurities, and can no longer serve the purpose for which they were produced. (This reworded definition appropriately parallels the definition of “used oil” – a type of spent material – in RCRA section 1004(36).)

²⁹ EPA’s inspections that form the basis of the Complaint began on March 2001.

of a manufacturing or waste disposal process. *See* Clean Air Act § 101, 42 U.S.C. § 7401. In contrast, RCRA's jurisdiction is limited to regulating waste activity.

I find that Congress chose to impose significantly different jurisdictional mandates for the Clean Air Act and for RCRA. Accordingly, EPA's definition of "paint shop" in the Clean Air Act Auto MACT rule is not persuasive for defining the extent of a manufacturing process unit under RCRA.

2. Totally Enclosed Treatment Facility Exemption

GM contends, *arguendo*, that even if its purge mixture is a solid waste, its piping and equipment downstream of the manifolds and associated applicators constitutes a single, continuous totally enclosed treatment facility ("TETF") and is thereby exempt from complying with hazardous waste regulations. GM's Post-Hrg. Br. at 67-71 (referring to 40 C.F.R. § 265.1(c)(9); *accord* Mich. Admin. R. 299.9601(6), 299.9503(1)(d)). TETF is defined as "a facility for the treatment of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during treatment. An example is a pipe in which waste acid is neutralized." 40 C.F.R. § 260.10; *accord* Mich. Admin. R. 299.9208(g); Ohio Admin. Code § 3745-50-10(A)(119).

I agree with the Complainant that GM's facilities fail the requirement of being "constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment."³⁸ *See* Complainant's Post-Hrg. Reply Br. at 44-49. In Federal Register statements subsequent to promulgating the definition of TETF, the EPA has made clear that the term TETF is narrowly defined to the extent that it cannot leak, spill, or discharge waste, or release emissions into the air:

The EPA believes that many on-site treatment facilities also are not totally enclosed. Distillation columns and other treatment technologies typically are designed to release emissions into the air. Therefore, by definition, these on-site technologies generally are not totally enclosed. (See 45 FR 33218, May 19, 1980 (no constituents released to air during treatment).)

Two important characteristics define a totally enclosed treatment facility. The key characteristic of a totally enclosed treatment facility is that it does not release any hazardous waste or constituent of hazardous waste into the environment during

³⁸ Accordingly, I need not determine whether GM satisfies the "treatment" requirement.

later phases of treatment, the question was whether discard happens before primary treatment, allowing regulation of wastewater as solid waste at that point, or not until primary treatment is complete and oil has been recovered for further processing. *Id.* “At bottom, the parties disagree[d] over the proper characterization of primary treatment. Is it simply a step in the act of discarding? Or is it the last step in a production process before discard.” *Id.* at 57. Accordingly, *API II* addressed where to “draw a line for deciding when discard has occurred.” *Id.* In drawing the line where discard begins, *API II* announced a “predominant purpose” test. *Id.* at 57-58. In doing so, the D.C. Circuit recognized that the issue of whether the predominant purpose of an activity is discard requires an inquiry into facts and circumstances, and that where an industrial by-product may be characterized as either discarded or “in process” material, EPA’s choice of characterization is entitled to deference by the courts. *Id.* at 57 (citing *AMC II*, 907 F.2d at 1186).

Finally, we arrive at the D.C. Circuit’s most recent case dealing with the definition of “solid waste”: *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003), *revised in part and remanded upon petition for rehearing*, 365 F.3d 46 (D.C. Cir. 2004). In *Safe Food*, the EPA had promulgated a rule regarding zinc fertilizers produced from recycled byproducts of certain industrial processes. *Id.* at 1265. The rule “[r]esolved that Subtitle C of [RCRA] would not apply to the recycled materials used to make zinc fertilizers, or to the resulting fertilizers themselves, so long as they met certain handling, storage and reporting conditions and (in the case of the fertilizers themselves) had concentration levels for lead, arsenic, mercury, cadmium, chromium, and dioxins that fall below specified thresholds.” *Id.*; *see* 67 Fed. Reg. 48,393 (July 24, 2002), *promulgated at*, 40 C.F.R. §§ 261.4(a)(20)-(21), 266.20(d). The EPA reasoned that so long as these materials met the specified conditions they should not be seen as “discarded” within the meaning of RCRA’s definition of “solid waste,” 42 U.S.C. § 6903(27).” *Safe Foods*, 365 F.3d at 1266.

Nonprofit organizations petitioned for review of the rule, claiming that both the materials and the fertilizer are “hazardous wastes” and that therefore the EPA must regulate them under RCRA. *Id.* at 1265. More specifically, the petitioners challenged EPA’s decision that recycled materials complying with the specified conditions are not “discarded” material. *Id.* at 1268. The petitioners asserted that, as a matter of plain meaning, the materials in question are “discarded” even though they are recycled in a useful product. *Id.* Moreover, they claimed that under the D.C. Circuit’s cases, recycled material destined for immediate reuse within an ongoing industrial process is never considered “discarded,” whereas material that is transferred to another firm or industry for subsequent recycling must *always* be so viewed. *Id.*

In *Safe Foods*, 350 F.3d at 1268, the D.C. Circuit discussed its prior holdings:

We have held that the term “discarded” cannot encompass materials that “are destined for beneficial reuse or recycling

states that the Complainant offered no evidence indicating that these changes triggered the integrity assessment requirement. *Id.* Therefore, GM asserts that the Complainant is precluded from claiming that these changes triggered the assessment requirements. *Id.* Without citing to the record, GM asserts that Ms. Winkler's and Mr. Chaput's testimony demonstrate that GM complies with the integrity assessment requirements and has been in compliance with these requirements for Pontiac for all applicable time periods (and since no later than November 4, 2002 at Moraine and Orion). *Id.* at 96.

Although the Complainant agrees with GM that an integrity assessment for Moraine was performed in November 2002, it challenges the dates for Pontiac and Orion. Complainant's Post-Hrg. Br. at 35. The Complainant contends that the integrity assessment was not performed at Pontiac until April 2003 and was not performed at Orion until February 2003. *Id.* (citing RX 47; RX 81).

Regarding whether Pontiac's tank system is "new" within the meaning of the regulations, the Complainant contends that the age of Pontiac's tank system is not relevant to demonstrating that GM was in violation of the regulations. Complainant's Post-Hrg. Br. at 61. The Complainant argues, if GM's tank system was not "new," it was "existing." *Id.* The Complainant argues that if the tank system was existing, GM was still required by 40 C.F.R. § 265.191(a) to have an integrity assessment performed (by January 12, 1988) unless the tank system had secondary containment meeting the requirements of 40 C.F.R. § 265.193. Complainant's Post-Hrg. Br. at 61.

With regards to the changes at the facilities, occurring after 1986, that GM identified in its Post-Hearing Brief, the Complainant contends that those exhibits are, indeed, evidence that both systems are "new" within the meaning of the regulations. Complainant's Post-Hrg. Reply Br. at 35. The Complainant asserts that it did not point those changes out in its brief because they did not matter. *Id.* at 35-36. The Complainant points out that "existing" tank systems still need integrity assessments if they do not have secondary containment, and points out that GM's facilities lacked secondary containment. *Id.* at 36.

b. Tribunal's Discussion

The Federal, the Michigan, and the Ohio regulations provide that owners and operators who use tank systems to treat or store hazardous waste shall comply with the requirements of 40 C.F.R. part 265, subpart J. 40 C.F.R. § 262.34(a)(1)(ii); *accord* Mich. Admin. R. 299.9615; Ohio Admin. Code § 3745-52-34. The Federal regulations' subpart J, 40 C.F.R. § 265.192(a), which governs new tank systems or components, provides:

Owners or operators of new tank systems or components must ensure that the foundation, structural support, seams, connections, and pressure controls (if applicable) are adequately designed and

